SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 463

LEE ARENAS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN W. PRESTON,
Counsel for Petitioner.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Lee Arenas, appellant in the Court below (R. 61-64), respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 59) on the 30th day of June, 1943. A petition for rehearing was filed on the 28th day of July, 1943 (R. 77), and a rehearing was denied by said Court on the 4th day of August, 1943 (R. 77), and the judgment of said Court is final.

Opinions Below.

The Circuit Court of Appeals for the Ninth Circuit rendered one opinion in the case, which is not yet reported. A copy of said opinion is set forth in the Appendix, p. 19.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)).

Statutes Involved.

The statutes involved are: (1) The Act of January 12, 1891 (Ch. 65, 26 Stat. 712), known as the Mission Indians Act; (2) The General Allotment Act of February 8, 1887 (Ch. 119, 24 Stat. 388, 25 U. S. C. A., Sec. 331, et seq.); (3) The Act of March 2, 1917 (Ch. 146, 39 Stat. 969, 976), amending said Mission Indians Act; and (4) The Act of February 14, 1923 (Ch. 76, 42 Stat. 1246, 25 U. S. C. A., Sec. 335), making the General Allotment Act applicable to the Mission Indians. Pertinent parts of these Acts are set forth in the Appendix, pp. 20-23. Other statutes, incidental to the foregoing, will be referred to herein.

Summary Statement.

Petitioner brought this suit in the District Court of the United States for the Southern District of California to secure a judicial determination of his right to an allotment of tribal lands, under Section 345 of Title, 25 U. S. C. A. (31 Stat. 760) (R. 2-48). The complaint alleges: That petitioner is a full blood Mission Indian and is a member of the Agua Caliente (Palm Springs) Band of Mission Indians of California; that he was born and has ever since lived upon the Palm Springs Indian Reservation, and has at all times

kept and maintained his tribal relationship, membership and enrollment in said Agua Caliente (Palm Springs) Band of Mission Indians; that he has at all times kept and maintained his home and residence separate and apart from any tribe of Indians on said Reservation, and throughout his entire life has adopted the habits, ways and methods of civilized life (R. 2-4); that he is able to read and write the English language, possesses a degree of education and intelligence above the average of any race, and since February 8, 1887, has been entitled to all of the rights, privileges and immunities of a citizen of the United States and of the heritage of his Indian ancestry (R. 2-3); and that he is entitled to a trust patent to certain lands, specifically described in the complaint, from the United States of America (R. 47). The complaint further alleges that, in accordance with Acts of Congress (Appendix pp. 20-23) the Secretary of the Interior, on or about June 7, 1921, determined that the Palm Springs Band of Mission Indians, including petitioner, were so far advanced in civilization and had so far adopted the habits and ways of civilized life as to be capable of owning and managing land in severalty (R. 3-4); that shortly thereafter said Secretary of the Interior appointed a Special Allotting Agent to make or cause to be made allotments of land situated within the Palm Springs Indian Reservation to such of the Mission Indians, including petitioner, as made or might make selections for allotment in severalty to the duly and regularly enrolled members of said Band (R. 3-5); that, pursuant to said action and said Acts of Congress, petitioner selected the lands described in the complaint (R. 4) and said Special Allotting Agent thereupon allotted the lands so selected to petitioner and issued to petitioner a certificate of "Selection for Allotment" covering said lands (R. 4-9) and in evidence thereof inscribed said selection for allotment on the Official Special Allotment Schedules, and thereafter certified said selection

for allotment, and other such selections, and said Schedules to the Secretary of the Interior (R. 4-5); and that said Secretary thereafter, on or about October 26, 1923, instructed said Special Allotting Agent to put petitioner and other allottees in physical possession of the properties selected by them, respectively, for the use and enjoyment thereof (R. 10-11) for agricultural and other purposes. The complaint further alleges that thereafter petitioner took sole and exclusive possession of the lands selected by and allotted to him by said Special Allotting Agent, and with the knowledge and consent of and upon encouragement by said Special Allotting Agent, petitioner made costly and extensive improvements upon said lands of the approximate value of Fifteen Thousand Dollars ($15,000.00) which otherwise he would not have made, and that by reason thereof the respondent United States of America is estopped to deny that petitioner acquired and now has equitable title to said lands (R. 11-15). Petitioner prayed that it be adjudged and decreed that he is vested with equitable title to said lands, that he is entitled to a Trust Patent to said lands, that a copy of such judgment and decree of the Court be certified to the Secretary of the Interior of the United States, and for his costs and such other and further relief as justice and equity may require (R. 44-48).

The United States of America thereupon filed motion for dismissal of said complaint or, in the alternative, for a summary judgment, upon the files, records and pleadings in this case and upon the files, records, pleadings and further proceedings in the case of *Genevieve St. Marie* v. *United States of America, et al.*, filed in the same District, numbered Equity 918-Y therein, reported in 24 F. Supp. 237, and, upon appeal reported in 108 F. 2d 876. Upon a hearing of said motion to dismiss, or for summary judgment, the District Court granted the motion for a summary judgment

upon the ground that the issues raised herein had been previously decided adversely to petitioner's contention in *St. Marie* v. *United States, supra* (R. 59-60). Petitioner appealed from said judgment to the Circuit Court of Appeals for the Ninth Circuit (R. 61-69) and said Court, in a one-page opinion, affirmed the judgment of the District Court (Appendix p. 19).

Holding of the Circuit Court of Appeals.

The Circuit Court of Appeals held that its decision in the case of *St. Marie* v. *United States*, 108 F. (2d) 876, must be followed, and that said decision held "that until the Secretary of the Interior approved the alleged allotments there was no right thereto vested in the alleged allottee." The Court further held that there can be no estoppel on the part of the federal authorities to question the validity of the alleged allotment to petitioner, citing *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 61 L. Ed. 791, and *Yuma County Water Users' Association* v. *Schlecht*, 262 U. S. 138, 67 L. Ed. 909, in support thereof. Petitioner respectfully asserts that said holding is contrary to well-recognized principles of law.

The Questions Involved.

The principal questions here involved are:

1. The decision of the Circuit Court of Appeals is contrary to the applicable Acts of Congress and to the decisions of this Court and other Circuit Courts of Appeals.

2. Under the facts pleaded in the complaint the United States of America is estopped to deny the power and the duty of the Secretary of the Interior to issue a trust patent to petitioner to the lands selected for allotment by him.

3. The United States of America is estopped by reason of the laches of the Secretary of the Interior, in withholding

formal approval of petitioner's selection for allotment, to deny petitioner's equitable right and title to the lands selected by him.

4. The law does not authorize the Secretary of the Interior to withhold a trust patent from a qualified allottee who has established an equitable right thereto.

5. The petitioner has done everything which the Acts of Congress and law require him to do to attain his right to a trust patent to the lands selected by him for allotment, and the neglect or failure of the Secretary of the Interior to issue such patent does not defeat petitioner's right thereto.

Reasons Relied On for the Allowance of the Writ.

I.

The Decision of the Circuit Court of Appeals In This Case was Rendered upon the sole Authority of its Decision in St. Marie v. *United States, 108 F. 2d 876, and That Decision is in Conflict With the Applicable Acts of Congress and the Decision of This Court and Other Circuit Courts of Appeals.*

A.

(Errors below in holding that *St. Marie* v. *United States*, 108 F.2d 876, is controlling of this case.)

1. *The St. Marie case, supra, is clearly distinguishable from the case at bar.*

Reference to the one-page opinion of the Circuit Court of Appeals shows clearly that the decision of that Court rested almost entirely upon its decision in the *St. Marie* case, *supra*. The *St. Marie* case is distinguishable from the case at bar. Moreover, the decision of the Circuit Court of Appeals in the *St. Marie* case is in conflict with applicable law.

In the *St. Marie* case, *supra*, the Circuit Court of Appeals held that "there had been no determination that the (Mission) Indians in question were sufficiently advanced so as to comply with the act, and the approval of the Secretary was lacking, 24 F. Supp. 240." (108 F. 2d 876, 879.) This conclusion was reached by the District Court *after a trial on the merits.* The Circuit Court of Appeals affirmed the judgment of the District Court.

In the case at bar there was no trial on the merits; instead, a summary judgment was rendered upon motion of respondent for dismissal of the complaint or for a summary judgment (R. 48-49, 59-60). Such a motion admits the truth of the facts alleged in the complaint. The complaint in this case alleges inter alia: That "the Secretary of the Department of the Interior * * * did, on or about, to wit, the 7th day of June, 1921, determine that, in his opinion, the aforesaid Band of Mission Indians, including complainant, were so far advanced in civilization and had so far adopted the life, habits and ways of civilized life as to be capable of owning and managing lands in severalty" (R. 3-4); and that, pursuant to such determination and the Act of January 12, 1891, as amended, the Secretary of the Interior appointed one H. E. Wadsworth Special Allotting Agent at Large for the Mission Indians of California, and "that said H. E. Wadsworth, as such Special Allotting Agent at Large, of the Department of the Interior, surveyed and classified, the lands of said Band of Mission Indians, contained within the limits and boundaries of said Indian Reservation, *and did allot to your complainant in severalty* * * * the following * * *" (R. 4-9). (Italics ours.) It thus appears that there was a determination by the Secretary of the Interior that Petitioner had capacity to own and manage lands in severalty. But, even if the Secretary had not made such a determination, the Congress had already made the necessary determina-

tion, by the Act of March 2, 1917 (Appendix p. 22) and had thereby imposed upon the Secretary the mandatory duty of making allotments in severalty to the Mission Indians. (Ibid.)

It is clear from the foregoing that the *St. Marie* case, even if sound, is distinguishable from the case at bar.

2. *The decision of the Circuit Court of Appeals for the Ninth Circuit in St. Marie v. United States, 108 F. 2d 876, is in Conflict with the Applicable Acts of Congress and the Decisions of this Court and of other Circuit Courts of Appeals.*

The decision of the Circuit Court of Appeals in *St. Marie v. United States*, 108 F. 2d 876, was by a divided Court, Judge Garrecht dissenting from the majority decision (108 F. 2d 881-897) in a very able and comprehensive opinion wherein the various applicable Acts of Congress and Court decisions are collated, discussed and applied to the facts of that case. Much of that dissenting opinion is applicable to the case at bar. It is especially valuable in its discussion and construction of Congressional legislation providing for allotment of lands in severalty to the Mission Indians, and its reasoning is sound and convincing.

The Mission Indian Act (Act of January 12, 1891)—(see Appendix pp. 20, 21) provides (Sections 2 and 3) for the selection of reservations by commissioners appointed for that purpose for the various bands of Mission Indians of California, for the certification of such selections to the Secretary of the Interior, and, if no objections are filed, to the issuance of a patent to each band in trust for a period of twenty-five (25) years. Section 4 of the Act (Appendix p. 21) provides "that whenever any of the Indians * * * shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary * * * may

cause allotments to be made to such Indians * * *." From these provisions it is apparent that the issuance of patents to individual Mission Indians rested within the discretion and judgment of the Secretary during said period of twenty-five years. Some individual allotments were made under these provisions of the Act.

Shortly after the expiration of the twenty-five year period prescribed in the Act, during which the United States should hold in trust for each Band of Mission Indians the lands selected by the commissioners, the Congress amended the Mission Indian Act by the Act of March 2, 1917 (Appendix, p. 22) as follows: "Provided, that *the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California,* in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten * * * instead of as provided in section 4 of the Act of January twelfth, eighteen hundred and ninety-one. * * *" (Italics ours.) This amendment, as indicated by the italicized portion thereof, *supra,* shows clearly: (1) That the Congress itself thereby determined that the Mission Indians were sufficiently advanced in civilization to warrant allotments to them in severalty, and (2) that the Secretary of the Interior no longer had discretion but that thereafter it was his mandatory duty to make allotments and issue patents to these Indians in severalty. The majority opinion of the Circuit Court of Appeals (108 F. 2d 881) refers to the foregoing interpretation of the Act of March 2, 1917, but makes no decision thereon, merely saying: "Since this is not a proceeding to compel action by the Secretary, we need not decide which meaning is correct."

Following the passage of the amendatory Act of March 2, 1917, the Secretary of the Interior appointed a Special

Allotting Agent to survey and make selections for allotment of lands in severalty for the Mission Indians, and such surveys and selections were duly made, and certificates issued to the Indians accordingly. These acts of the Secretary and the Special Allotting Agent are utterly meaningless, except as being in performance of the mandatory duties imposed upon the Secretary by said Act. The very purpose of the Mission Indian Act and the Act of March 2, 1917, *supra*, that is, to allot lands to the Mission Indians in severalty, was thus carried out.

That the Act of March 2, 1917, imposed a mandatory duty, and not mere discretion, upon the Secretary of the Interior to make allotments and issue patents in severalty to the Mission Indians is clearly indicated in a communication from the Secretary of the Interior, signed by the Assistant Secretary, to the Attorney General of the United States, saying:

> "As to the allotment feature of the situation, we are confronted with the provision in the act of March 2, 1917 (39 Stat. 976), amending Section 3 of the act of January 12, 1891 (26 Stat. 712), so as to *direct* the Secretary of the Interior to make allotments to the Indians of the Mission Reservations in California in areas as provided in section 17 of the act of June 25, 1910 (36 Stat. 859), rather than as provided in section 4 of the act of January 12, 1891, supra; in other words, *usually regarded as mandatory rather than discretionary legislation.*" (Italics ours.)

See dissenting opinion, 108 F. 2d 890.

The Attorney General, in this connection, wrote to the United States District Attorney at Los Angeles in part as follows:

> "Moreover, in view of the present status of the law on the subject it is not quite certain whether the Government could successfully resist the action of these

or any other individual members of the tribe (Mission Indians) for allotments within said reservation." (Ibid.)

Furthermore, the certification of the allotment schedule by the Special Allotting Agent shows that the Act of March 2, 1917, as well as the General Allotment Act, was followed in making the selections for allotment. That certification is as follows:

"Palm Springs, California,
"May 9, 1927.

"This is to certify that listings of allotment selections for the Indians of Palm Springs (Agua Caliente) Indian Reservation, Calif., began on June 1, 1923, and the same were completed on May 9, 1927; and that it is further certified that the allotments shown hereon were made in accordance with the provisions of the act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the act of June 25, 1910 (36 Stat. L. 855), and supplemented by the act of March 2, 1917 (39 Stat. L. 969-76).

"H. E. WADSWORTH,
"*Special Allotting Agent.*
"C. L. ELLIS,
"*Superintendent Mission Indian Agency, California.*" (108 F. 2d 879.)

The wording of the Acts of Congress and the interpretation placed thereon by Administrative officers, *supra*, show that the decision of the Circuit Court of Appeals in *St. Marie* v. *United States* is in conflict with said Acts, is unsound, and should not have been followed in the case at bar.

B.

(Error below in holding that the federal authorities are not estopped to question the validity of petitioner's right and equitable title to the lands selected for allotment by him.)

The Court below held that there is no merit in the estoppels pleaded by petitioner in his complaint, citing in support thereof *Utah Pr. & Lt. Co.* v. *United States*, 243 U. S. 389, 61 L. Ed. 791, and *Yuma* v. *Schlecht*, 262 U. S. 138, 67 L. Ed. 909. These cases are not in point, but rest upon the proposition that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done *what the law does not sanction or permit.*" (*Utah Lt. & Pr. Co.* v. *United States, supra.*) (Italics ours.) But in the case at bar the law (Acts of Congress, *supra*) not only *sanctioned but directed* the Secretary of the Interior to do the acts relied on by petitioner for estoppel. The two cases cited, *supra*, do not support the Court's holding. See *United States* v. *Big Bend Transit Co.*, 42 F. Supp. 459, 474; *United States* v. *City and County of San Francisco*, 310 U. S. 16, 60 S. Ct. 749, 757, 84 L. Ed. 1050.

It is conceded that the United States may not be estopped to exercise its sovereign powers. But, in respect of the acts and omissions complained of in this case, the United States was acting, not as a sovereign, but as a fiduciary or trustee for the Mission Indians, including petitioner. Under the authorities, it may be estopped in the latter capacity. (See, *19 Am. Jur.* 822, sec. 169; *31 C. J. S.* 411, sec. 140; *10 R. C. L.* 704, 705, secs. 31, 32; *Bronson* v. *Wirth*, 17 Wall. 32, 21 L. Ed. 566; *United States* v. *Denver & R. G. W. R. Co.*, 16 F. 2d 374; *United States* v. *Big Bend Transit Co.*, 42 F. Supp. 459; *19 Harvard L. Rev.* 127; *State* v. *Horr*, 165 Minn. 1, 205 N. W. 444.) The rule applicable here is thus stated in *31 C. J. S. 411*, sec. 140:

> "It has been broadly stated that there can be no estoppel against the United States or a State. Nevertheless, subject to limitations and exceptions considered supra section 138, it is well established that in a 'proper case' the doctrine of equitable estoppel may

apply as against the federal and state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against the United States, a state, or a state agency, commission, or officer."

In *United States* v. *Denver & R. G. W. R. Co.* (8 Cir.), 16 F. 2d 374, *supra*, it was said:

> "The equitable claims of the state or of the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim. *State of Iowa* v. *Carr* (C. C. A.), 191 F. 257, 266; *United States* v. *Chandler-Dunbar Water Power Co.* (C. C. A.), 152 F. 25, 41; *United States* v. *Debell* (C. C. A.), 227 F. 775, 779; *Rannels* v. *Rowe* (C. C. A.), 145 F. 296, 301; 1 Pomeroy's Eq. Jur., Sec. 451."

To like effect are *Hannibal & St. Jo. R. R. Co.* v. *Smith*, 9 Wall. 95, 19 L. Ed. 599; *Van Wyck* v. *Knevals*, 106 U. S. 367, 27 L. Ed. 201, 203; *2 Land Dec.* 166; *Bonifer* v. *Smith*, 166 Fed. 846, 849.

The following allegations of fact in the complaint fully support the estoppels pleaded: Determination by Secretary of the Interior that Mission Indians are capable of owning and managing their lands in severalty; order appointing and authorizing Special Allotting Agent to survey or cause to be surveyed Mission Indian lands and to select or cause to be selected for allotment such lands in severalty to the members of the Palm Springs Band of Mission Indians; the actual survey and selection of said lands; the inscribing of the selections made upon the Official Special Allotment Schedules; the certification of said Schedules to the Secretary of the Interior; the issuance of Certificates of "Selections for Allotment" to the several Mission Indians mak-

ing such selections, including petitioner; representations and statements to petitioner by Special Allotting Agent that "patent in trust would issue to complainant (petitioner) covering said parcels of land * * * by reason of said selection, scheduling and certification for allotment" (R. 12); placing petitioner in physical possession of said lands, upon order of the Secretary of the Interior; permitting and encouraging petitioner to make improvements on lands selected by him of the value of $15,000.00, which otherwise he would not have made; occupancy of said selected lands by petitioner since October 26, 1923, under said proceedings and orders; and thereafter negligence and failure of Secretary of the Interior to issue patent in trust to petitioner as authorized and directed by law (Act of Congress, March 2, 1917, amending Mission Indian Act, 39 Stat. 969, 976), providing: "That the Secretary of the Interior be, and he is hereby, *authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations of the State of California* * * *" (Italics ours.)

In this connection, the estoppels pleaded by petitioner also distinguish the case at bar from *St. Marie* v. *United States, supra.*

II.

The Law Does Not Authorize the Secretary of the Interior to Withhold a Trust Patent From a Qualified Allottee Who Has Established a Vested Equitable Right Thereto.

The determination made and the action taken by the Secretary of the Interior and the procedure followed in the surveying, selection, scheduling and certifying of petitioner's allotment was the inception of an equitable title which vested in petitioner, and of which he cannot now be deprived by failure of the Secretary to act. This equitable title is given added strength by the subsequent acts and

omissions of the Secretary over a period of many years, as hereinbefore set forth. See *Smith* v. *Bonifer*, 154 Fed. 883, 887; *Wyoming* v. *United States*, 255 U. S. 489, 65 L. Ed. 742; *Payne* v. *New Mexico*, 255 U. S. 367, 65 L. Ed. 680; *Payne* v. *Central P. R. Co.*, 255 U. S. 228, 65 L. Ed. 598; *Raymon Bear Hill*, 52 Land Dec. 688, 690; *Parr* v. *United States*, 153 Fed. 468; *Thomason* v. *Wellman & Rhoades*, 206 Fed. 895; *Lytle* v. *Arkansas*, 9 Howard 314, 13 L. Ed. 153; *Beam* v *United States*, 162 Fed. 260; *Barney* v. *Dolph*, 97 U. S. 652, 24 L. Ed. 1063; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. Ed. 482; *Ballinger* v. *Frost*, 216 U. S. 240, 54 L. Ed. 464; *Millet* v. *Bilby*, 110 Okla. 241, 237 Pac. 859; *Reynolds* v. *Brooks*, 49 Okla. 188, 195, 152 Pac. 411, 413.

A.

(In the enactment of the Mission Indian Act and the Amendments thereto (Act of January 12, 1891, Ch. 65, 26 Stat. 712; Act of March 2, 1917, Ch. 146, 39 Stat. 969, 976) the Congress obviously intended that when an allotment was selected by and scheduled to a qualified Mission Indian, under the supervision of the Secretary of the Interior, there was thereby vested an equitable right in the allottee of which he could not be deprived by the failure of the Secretary to comply with the direction of these statutes.)

It should be remembered the petitioner was *entitled to land* in the Palm Springs Indian Reservation *as a matter of right*. Selection of particular lands was not the inception of his right *but of his title thereto*. See *Hooks* v. *Kennard*, 28 Okla. 457, 463, 114 Pac. 744, 746; *Reynolds* v. *Brooks*, 49 Okla. 188, 195, 152 Pac. 411, 413; and *Parr* v. *United States*, 153 Fed. 468, where it was said:

> "The word 'allot' as used in an act for the allotment of lands to Indians in severalty * * * is not a term of sale or grant, *but of apportionment of that to which the parties are entitled as of right.*" (Italics ours.)

And, in *Millet* v. *Bilby*, 101 Okla. 241, 237 Pac. 859, the Court said:

> "*The right to the allotment already existed*, and the United States, by the allotment or certificate, merely set aside to the Indian the land that was rightfully his, after he had made his selection." (Italics ours.)

The allotment certificate, issued by the Special Allotting Agent to petitioner, the inscription thereof upon the allotment schedules, and the certification of these schedules to the Secretary of the Interior constituted a setting aside to petitioner of the lands selected by him as a duly qualified member of the Palm Springs Band of Mission Indians. Petitioner's equitable title to said lands thus became vested. The fact that the Secretary of the Interior has not executed formal approval or issued the trust patent, in no way affects petitioner's equitable rights in the lands selected. *Thomason* v. *Wellman & Rhoades*, 206 Fed. 895, 897; *Mullen* v. *United-States*, 224 U. S. 457, 56 L. Ed. 834. The execution and delivery of the patent, after the right to it is complete, are mere ministerial acts of the Secretary of the Interior. See cases cited, supra. It has long been the law that "when the right to a patent once became vested * * * it was equivalent, so far as the government was concerned, to a patent actually issued." *Barney* v. *Dolph, supra; Simmons* v. *Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Stark* v. *Starr*, 6 Wall. 402, 18 L. Ed. 925; *Ballinger* v. *Frost, supra; Wallace* v. *Adams*, 143 Fed. 721, 74 C. C. A. 540; *Thomason* v. *Wellman & Rhoades, supra.*

B.

(Petitioner has done everything which the law required him to do, and his equitable right and title to the lands selected, surveyed, scheduled and certified cannot be defeated by the failure or neglect of the Secretary of the Interior to act.)

See, *Pomeroy* v. *Wright*, 2 Land Dec. 166; *Lytle* v. *Arkansas*, 9 Howard 314, 333, 13 L. Ed. 153, 160; *Hannibal & St. Jo. R. R. Co.* v. *Smith*, 9 Wall. 95, 19 L. Ed. 599; *Van Wyck* v. *Knevals*, 106 U. S. 367, 27 L. Ed. 201, 203.

In *Lytle* v. *Arkansas*, *supra*, this Court states the rule, here invoked, as follows, p. 333 (L. Ed. 160):

> "It is a well-established principle, that where an individual in the prosecution of a right does everything which the law requires of him to do, and he fails to attain this right by the misconduct or neglect of a public officer, the law will protect him."

To like effect are *Pomeroy* v. *Wright*, *supra*; *Hannibal* v. *Smith*, *supra*, and *Van Wyck* v. *Knevals*, *supra*; *Barney* v. *Dolph*, 97 U. S. 652, 24 L. Ed. 1063; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. Ed. 482; *Ballinger* v. *Frost*, 216 U. S. 240, 54 L. Ed. 464; *United States* v. *Payne*, (9 Cir.) 284 Fed. 827; *Payne* v. *New Mexico*, 255 U. S. 367, 65 L. Ed. 680; and *Smith* v. *Bonifer*, 132 Fed. 889, 891, where it was further said that "it is a familiar principle that 'where one offers to do everything upon which a right depends, and is prevented by the other side, his right shall not be lost by his failure'. The *Yosemite* case, 15 Wall. 91, 21 L. Ed. 82."

The rule stated in these cases, *supra*, was applied in the case of *Raymond Bear Hill*, 52 L. D. 688, 690, as follows:

> "* * * it may be said generally that it is well settled that a claimant to public land who has done all that is required under the law to perfect his claim, acquires a right against the Government and that his right to a legal title is to be determined as of that time. This rule is based on the theory that by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his and the Govrenment holds it in trust for him, although no legal title passes until patent issues. Wyoming *v.* United States (255 U. S. 489); Payne *v.* New Mexico (255 U. S. 367); Payne *v.* Central Pacific Railway Company (255 U. S. 228).

> It would seem to follow that what is true concerning the equitable rights of an entryman to public land is also true as to the equitable rights of a qualified Indian to an allotment of tribal or reservation land. In fact, the position of a qualified Indian is stronger than that of an entryman of public land, for the reason that he has an inherent interest in the common property of his tribe."

See also *Hy-Yu-Tse-Mil-Ken* v. *Smith*, 194 U. S. 401, 48 L. Ed. 1039.

Your petitioner presents to this Court, and files herewith a duly certified transcript of the entire record of the case, as the same appears in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court to the Circuit Court of Appeals for the Ninth Circuit, to the end that the judgment of said Circuit Court of Appeals for the said Circuit may be reviewed by this Honorable Court.

LEE ARENAS,
Petitioner,
By JOHN W. PRESTON,
Counsel for Petitioner.

APPENDIX.

Opinion of the Circuit Court of Appeals for the Ninth Circuit. (Omitting caption.)

"Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

"Before Wilbur, Denman and Mathews, Circuit Judges.

"WILBUR, *Circuit Judge:*

"The appellant is a member of the Agua Caliente Band of Mission Indians of the Palm Springs Reservation in Riverside, California. He claims the right to certain land described in his complaint on the theory that the same has been allotted to him by the Secretary of the Interior. He admits that the points raised by him were disposed of by this court adversely to his claim in the case of St. Marie *v.* United States, 108 F. 2d 876. He claims, however, that that decision was in error and also that this case may be distinguished from the former decision upon the ground that it is admitted in the case at bar 'that there had been a determination that the Indians in question were sufficiently advanced so as to comply with the act' under which the allotments were made. That case was predicated upon the theory that until the Secretary of Interior approved the alleged allotments there was no right thereto vested in the alleged allottee. In this case we follow the decision heretofore made in the St. Marie case.

"The appellant also urges that there is an estoppel on the part of the federal authorities to question the validity of the alleged allotment to the appellant. There is no merit in this contention. Utah Pr. & Lt. Co. *v.* United States, 243 U. S. 389; Yuma *v.* Schlecht, 262 U. S. 138.

"Affirmed.

"DENMAN, Concurring:

"I concur. Congress by the Act of June 18, 1934, 25 U. S. C. A. 461, has taken from the Secretary of Interior any power he theretofore had to allot lands, except with

the consent of the tribe, such consent not here known to have been given. 25 U. S. C. A. 478(a). Unless Arenas had some legal or equitable right to the lands he claims, of which it would be a violation of the Fifth Amendment to deprive him, his claim here is invalid.

"The Act of March 2, 1917, 39 Stat. 969, 976, does no more than change the acreage which the Secretary may allot under the Mission Indian Act of January 12, 1891, 26 Stat. 712. Under the latter Act the Indian has no such right of selection for the allotment and no such property right in the selected land as was given the Indians under the General Allotment Act of 1887, or its amendments, 25 U. S. C. A. 331, 332, and as recognized in Sec. 1 of the Act of 1894, 31 Stat. 760, 25 U. S. C. A. 345, and in such cases as Hy-Yutse-Mil-Kin *v.* Smith, 194 U. S. 401.

"Under the Mission Indian Act a selection, made by the Secretary as a step in the allotment of land to some Indian, was not binding on the government. The Secretary could have made some other selection as a substitute for the same Indian. Only when an allotment was made did the allottee acquire any right in the land. Since there was no such action in Arenas' favor prior to 1934, he has no property right of any kind of which it could be construed that the Constitution forbids taking from him by the 1934 Act.

"(Endorsed:) Opinion and Concurring Opinion. Filed Jun. 30, 1943. Paul P. O'Brien, Clerk."

Mission Indian Act.

The Act of January 12, 1891 (Ch. 65, 26 Stat. 712), omitting caption, provides in part as follows:

> "Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior * * *

"Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: * * *

"Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: * * *.

"Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever * * *."

Amendment of Mission Indian Act.

The Mission Indian Act was amended by the Act of March 2, 1917 (39 Stat. 969, 976) as follows:

> "Provided, that *the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California,* in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large page seven hundred and thirteen): Provided, that this act shall not affect any allotments heretofore patented to these Indians." (Italics ours.)

General Allotment Act.

The Act of February 8, 1887 (Ch. 119, Sec. 1, 24 Stat. 388) as amended by the Act of February 28, 1891 (Ch. 383, Sec. 1, 26 Stat. 794) and by the Act of June 25, 1910 (Ch. 431, Sec. 17, 36 Stat. 859) is codified in Title 25 U. S. C. A., Section 331, as follows:

> "In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be

brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein with the consent of the Indians expressed in such manner as the President in his discretion may require."

Act of February 14, 1923

The Act of February 14, 1923, Ch. 76, 42 Stat. 1246 (Title 25 U. S. C. A., Section 335) extends the General Allotment Act to the Mission Indians, inter alia, as follows:

"That unless otherwise specifically provided, the provisions of the * * * (General Allotment Act), as amended, be and they are hereby, extended to all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."